

(26,359)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 392.

CHARLES B. SHAFFER, APPELLANT,

vs.

E. B. HOWARD, STATE AUDITOR OF THE STATE OF
OKLAHOMA, AND JOHN S. WOOFER, SHERIFF OF
CREEK COUNTY, STATE OF OKLAHOMA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF OKLAHOMA.

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1 In the United States District Court for the Eastern District of
Oklahoma.

Pleas and Proceedings before the Honorable Kimbrough Stone,
Circuit Judge of the Eighth Circuit, Honorable John H. Cottoral,
District Judge of the Western District of Oklahoma and Honorable
Ralph E. Campbell, District Judge of the Eastern District of Okla-
homa, presiding in the Following Entitled Cause:

In Equity.

No. 2444.

CHARLES B. SHAFFER, Plaintiff,

vs.

E. B. HOWARD, State Auditor, and JOHN S. WOOFER, Sheriff, De-
fendants.

2 In the United States District Court for the Eastern District of
Oklahoma.

No. 2444. Equity.

CHARLES B. SHAFFER, Plaintiff,

vs.

E. B. HOWARD, State Auditor, and JOHN S. WOOFER, Sheriff, De-
fendants.

Amended Bill of Complaint.

The plaintiff, Charles B. Shaffer, complains of the defendants,
E. B. Howard, State Auditor, and John S. Woofter, Sheriff, and
alleges:

That he, the said plaintiff, is a citizen and resident of the State
of Illinois and that he is not now and never has been a resident of
the State of Oklahoma; that the defendant, E. B. Howard, is the
duly elected and qualified State Auditor of the State of Oklahoma
and, as such, is charged with the duty of collecting income taxes
due the said State under the terms and provisions of Chapter 164
of the Session Laws of Oklahoma of 1915, and that the defendant,
John S. Woofter, is the duly elected and qualified Sheriff of Creek
County, State of Oklahoma, and as such, is authorized and em-
powered to levy tax warrants and to collect delinquent taxes of all
sorts, including income taxes provided for under Chapter 164 of the
Session Laws of Oklahoma of 1915.

3 Plaintiff alleges that he is now and for several years has been engaged in the oil business in the State of Oklahoma and that as such he has purchased, owned, developed and operated a number of oil and gas mining leases in said State, and that he is the owner in fee simple of a small amount of land in said State from which he produces oil; that a very small proportion of the oil produced by him in said state is produced from land to which he holds title. Plaintiff alleges that he was engaged in such business during the year 1915 and that from properties owned and operated by him in the State of Oklahoma during the year 1916, he received a net income of One Million Five Hundred Sixty-two Thousand Six Hundred Forty-seven and 96/100 (\$1,562,647.96) Dollars, which was produced largely from flush production from leases in the Cushing field, and which is greatly in excess of the income he will receive hereafter from the same property.

He alleges that Section 1 of Chapter 164 of the Session Laws of Oklahoma of 1915 (Act of the Legislature of the State of Oklahoma, approved March 17th, 1915) is as follows:

"Each and every person in this State shall be liable to an annual tax upon the entire net income of such person arising or accruing from all sources during the preceding calendar year, and a like tax shall be levied, assessed, collected and paid annually upon the entire net income from all property owned, and of every business, trade or profession carried on in this State by persons residing elsewhere."

Plaintiff alleges that Section 2 of said Chapter 164 requires a return to be made by each person liable under the provisions of the Act to the State Auditor on or before the 1st day of March of each year; and that Section 3 of said Chapter 164 provides a penalty for failure to make said return.

4 He alleges that said Auditor extended the time for filing reports under said Act, for the year 1916 for thirty days from the 1st day of March, 1917, and plaintiff alleges that on the 24th day of March, 1917, he made a return of his income which showed that at the rate fixed by said Chapter 164 of the Session Laws of Oklahoma of 1915, there was due the State of Oklahoma the sum of Seventy-six Thousand Sixty-seven and 40/100 Dollars (\$76,067.40). He alleges that he made said return under protest and attached to said return a protest as follows:

Protest.

The return to which this is attached is made under protest and is not to be taken as an admission by me that I owe to the State of Oklahoma any income taxes whatever, on property belonging to me situate in said State. I specifically deny all liability to the State of Oklahoma for any income taxes whatever for the reasons given herein and any other reasons that I may hereafter be advised of:

First. Because my income is intangible personal property and has no existence within the State of Oklahoma and is not situated either

actually or legally in said State but only exists in the State of my residence, and because the State of Oklahoma has no extra territorial jurisdiction and cannot tax property not situated or existing within said State;

Second. Because if the income tax attempted to be levied on income paid to non-residents from property within the State of Oklahoma is to be considered as a property tax, then the payment of the taxes on the gross production of oil and gas as provided in Chapter 39 of the Session Laws of 1916, relieves me from the payment of the taxes for the reason that my income from property in the State of Oklahoma is derived from oil and gas producing properties; and

Third. Without waiving the grounds set forth under paragraphs one and two above, but insisting that they are both correct grounds upon which I can be excused from the payment of this tax, I contend that even though the first and second reasons above set forth should be decided against me, the tax upon my property would still be illegal and uncollectable because the income from property in the State of Oklahoma depends upon the management of the property and my personal attention. I do not reside in the State of Oklahoma and I give my personal attention to the business in Oklahoma from

my place of residence by the use of the mails and telegraphs
5 with an occasional trip to Oklahoma. The sales of oil and gas and the purchasing of equipment and supplies for the conduct of the business in Oklahoma is managed from my office in Chicago and my books are kept there. A portion of the products of my property in Oklahoma is sold out of the State and the Act of the Oklahoma Legislature under which this tax is collected provides no method or means by which the portion of the income arising from the skill and judgment with which the property is managed, and that derived from the property as such, without reference to the management, can be divided, and provides no method for division of profits on products produced in Oklahoma, but sold out of the State.

In stating these reasons why I cannot be required to pay this tax, I do not mean or intend to waive other grounds upon which the tax is illegal. The reasons given above occur to me at this time, but there are probably other reasons also. I reserve the right to make any defense to the collection of this tax or to claim any ground to recover same, if paid, that I may be entitled to in law or equity, whether stated herein or not.

Plaintiff alleges that the said defendant, E. B. Howard, State Auditor, disregarded said protest and assessed an income tax against him of Seventy-six Thousand and Sixty-seven and 40/100 (\$76,067.40) Dollars. Plaintiff alleges that Section 9 of Chapter 164 of the Session Laws of Oklahoma of 1915 with reference to income tax is as follows:

"The State Auditor is authorized to revise any returns that may be made to him, and he shall notify the party making such return of such revision on or before the first Monday in May following, and the Auditor shall hear and determine all complaints arising from such revision which are made before the first Monday in June following thereafter, and he shall have the same power to correct and

adjust such assessment of income as is now given by law to the County Board of Equalization in cases of assessments of property ad valorem and the remedy, and proceedings before the said Auditor, shall be the same as those provided for reviewing assessments of property ad valorem by the county board of equalization."

6 That the defendant, E. B. Howard, State Auditor, did not offer to revise or take any steps towards revising said return and that this plaintiff requested the said defendant to grant a hearing upon the matters set forth in the protest and other questions to be raised. That the said defendant granted a hearing and heard testimony on the 1st day of August, 1917, and that after hearing the evidence the said Auditor decided that he was without authority to pass on the legal questions raised and that he then and there over-ruled the protest and all legal questions raised and ordered a tax warrant issued. Plaintiff alleges that he did not pay said sum on the 1st day of July, 1917, as provided by Chapter 164 of the Session Laws of Oklahoma of 1915, and that he has not yet paid said sum or any part thereof, and alleges that on the — day of August, 1917, the defendant, E. B. Howard, issued a tax warrant against him and delivered same to the defendant, John S. Woofter, Sheriff of Creek County, Oklahoma, with instructions to levy upon and sell the property of this plaintiff in order to collect said sum of Seventy-six Thousand Sixty-seven and 40/100 (\$76,067.40) Dollars, with penalties thereto attached for failure to pay on the 1st day of July, 1917, and plaintiff alleges that the said defendant, John S. Woofter, is now threatening to levy said tax warrant upon the property of this plaintiff in Creek County, Oklahoma, and to sell the same for the collection of said tax warrant upon the property of this plaintiff in Creek County, Oklahoma, and to sell the same for the collection of said tax and penalties thereto attached, and that he will levy said tax warrant on the property of this plaintiff in Creek County, Oklahoma, and proceed to sell same within a short time, unless enjoined by this Court.

7 Plaintiff alleges that Chapter 164 of the Session Laws of 1915 of the State of Oklahoma, hereinabove referred to insofar as it attempts and purports to subject the income of non-residents of the State of Oklahoma, to the payment of a tax, is unconstitutional, illegal and void and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States for the reason that it attempts to abridge the privileges and immunities of a citizen of the United States and attempts to take the property of non-residents without due process of law and to deny non-residents of said State the equal protection of the law.

That said Chapter 164 so far as it attempts to tax the income of non-residents is unconstitutional, illegal and void and in violation of the Constitution of the United States because it attempts to lay a burden upon interstate commerce. Plaintiff alleges that the income received by him from Oklahoma and upon which said return was made, is not derived merely from investments in Oklahoma, but is derived from an active business in which he not only has a large investment of money, but to which he devotes his time

and business energy and judgment and that his income is produced from his business as such, and not simply from an investment in property in the State of Oklahoma. Plaintiff alleges that he manages his business from his office in the City of Chicago, in the State of Illinois; that all of his contracts are made and executed by him in said City of Chicago; that the books of his business are kept there, and that the sales of a considerable portion of the oil produced by him in the State of Oklahoma, are made to non-residents of the State of Oklahoma and delivered for immediate shipment outside of the State of Oklahoma and is interstate commerce, and that practically all of said oil is paid for outside of said State. He alleges that the net income produced from his property and business in Oklahoma is largely due to his management thereof and is dependent to a great extent upon his business judgment, ability and energy. He alleges that the State of Oklahoma is without jurisdiction, right or authority to tax his business skill and ability, and alleges that the statute above quoted provides no method or means by which the portion of his income derived from his business management and judgment can be separated from the income produced upon the property alone without regard to its management.

Plaintiff alleges that said statute insofar as it attempts to tax his personal services, skill and ability is void because it is an attempt to tax something not within the State of Oklahoma and deprives him of his property without due process of law, in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, and that said statute is void for indefiniteness because no method is provided in said statute for taxing his income from property separate and without regard to the management thereof.

Plaintiff alleges further that his income is intangible personal property which has its situs at his place of residence outside of the State of Oklahoma and that the State of Oklahoma has no jurisdiction to tax said income for the reason that the same is not within the jurisdiction of said State and that the tax so levied deprives the plaintiff of his property without due process of law.

Said plaintiff further alleges that said tax discriminates against non-residents in favor of residents, and that it discriminates against the plaintiff in favor of the residents of the State of Oklahoma and that it denies him the equal protection of the law in violation of the 1st Section of the Fourteenth Amendment to the Constitution of the United States and that it deprives him of the privileges and immunities enjoyed by residents of the State of Oklahoma in violation of Section 2 of Article 4 of the Constitution of the United States, for the reason that the net income of residents of the State of Oklahoma is made up from their income from all sources whether the property and business from which the same is derived is situated in or out of said State, and that the residents of the State of Oklahoma are entitled in computing their net income to deduct from the income from property and business within said State, all losses from investments or business situated or carried on

in any other State if said losses are sufficient to bring the entire net income within the amount exempt from taxation, residents of said State are not required to pay any income tax at all; but plaintiff alleges that under the terms of said Section 1 of Chapter 164 of the Session Laws of Oklahoma of 1915, a non-resident of the State of Oklahoma is not permitted to deduct from the income derived from property invested in said State and from business carried on within said State, the losses sustained in other States and is required to pay on his entire net income within the State even though he may have sustained losses from property or business in other states to such an extent as to reduce his entire net income from all of his property to such an extent as if he were a resident of the State of Oklahoma, he would not be required to pay any income tax.

He further alleges that the tax attempted to be levied upon him is in the nature of a property or excise tax and he alleges
10 that if it is an excise tax, it is void because it deprives him of the privileges and immunities enjoyed by residents of the State of Oklahoma in violation of Section 2 of Article 4 of the Constitution of the United States for the reason that no resident of the State of Oklahoma is required to pay an excise tax upon any business of the same or similar nature as that in which this plaintiff is engaged in said State.

Plaintiff further alleges that said Chapter 164 is unconstitutional, null and void insofar as it attempts to tax the incomes of non-residents and that the tax attempted to be assessed against him is illegal and void because it attempts to tax him for the privileges of engaging in business in the State of Oklahoma. He alleges that the State of Oklahoma is without jurisdiction, power or authority to tax a natural person, a non-resident of the State, for the privilege of engaging in business in said State.

Plaintiff alleges that said tax attempted to be levied on the income from his property in the State of Oklahoma is illegal and void because it is in violation of Section 2 of Article Two of the Constitution of the State of Oklahoma, which provides that, "all persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry," in that it would, if collected, deprive him of the gains of his own industry. He alleges that said tax is illegal and void because it is in violation of Section 7 of Article Two of the Constitution of the State of Oklahoma, for the reason that it will, if collected, deprive him of his property without due process of law.

Plaintiff further alleges that said tax is illegal and void for
11 the reason that it violates Section 3 of Article 1 of the Constitution of the State of Oklahoma, and of the third subdivision of Section 3 of the Enabling Act under which Oklahoma was admitted to the Union (34 Stat. 268), which provides that land belonging to citizens of the United States residing without the limits of the State shall never be taxed at a higher rate than the land belonging to residents thereof; and also for the reason that it violates Section 5 of Article Ten of the Constitution of the State of Oklahoma, which provides that taxes shall be uniform on the same

class of subjects. Plaintiff states that Chapter 164 of the Session Laws of the State of Oklahoma for the year 1915 attempts to tax his income from property and business in the State of Oklahoma at a higher rate than incomes from the same sources of residents of the State of Oklahoma because said Chapter does not provide for deducting from his income losses outside of the State, while a resident of the State can deduct from his income, losses from property or business outside of Oklahoma; and he alleges that said tax is in effect a tax on land, in that a tax on the income from land is a tax on land, and he alleges that said tax is not uniform for the same reason.

Plaintiff further alleges that the tax attempted to be levied by the provisions of Chapter 164 of the Session Laws of the State of Oklahoma of 1915, hereinabove referred to, while called an income tax, is in effect a property or excise tax insofar as it affects non-residents. He alleges that his entire income from property and business in the State of Oklahoma consists of the proceeds of oil and gas sold from producing properties in said State. He alleges that Chapter 39 of the Session Laws of Oklahoma of 1916 provides that

12 every person, firm, association or corporation engaged in the production of petroleum or other crude oil; or other mineral oil or of natural gas, within the State of Oklahoma shall pay a tax equal to three per centum of the gross value of the production of such petroleum or other crude oil or mineral oil or natural gas. He alleges that said Chapter also provides as follows:

"The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the State, counties, cities, towns, townships, school districts, or other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil, or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt, or ores bearing minerals hereinabove mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described; * * *

Plaintiff alleges that his entire income from property within the State of Oklahoma is derived from petroleum and other crude oil and mineral oil and natural gas produced from lands and leases in the State and that he has paid to the State of Oklahoma the three per centum of the gross value of the production of petroleum, crude and mineral oil and natural gas produced by him in said State during the year 1916, and that by reason of said Act of 1916, commonly known as the Gross Production Tax Law and by reason of the payment of the said three per centum of the value of the gross production he is relieved from the payment of any income tax upon the

income from said petroleum, mineral and crude oil and natural gas produced by him in said State, and that the attempted assessment of income tax is illegal and void because the payment of said gross production tax relieves him from said payment.

Plaintiff alleges that Section 7 of Chapter 107 of the Session Laws of Oklahoma of 1915 is as follows:

"In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

Plaintiff states that said section has no application to income taxes and further alleges that the defendant, Howard, State Auditor, holds that said section has no application to income taxes and that he has refused to accept income taxes under the provisions of said Section 7 and has stated that if plaintiff should pay him the amount assessed against him, that he, the State Auditor, would refuse to hold same as provided in said Section 7, and that he would pay the same into the State Treasury forthwith, and that he is now estopped to assert that said Section gives a remedy for the recovery of said taxes.

Plaintiff alleges that by the terms of Section 7 of Chapter 164 of the Session Laws of 1915, the income tax attempted to be collected by the defendants herein, is levied for the current expenses of the State Government of Oklahoma and he alleges that if the said sum of money claimed as his income tax is collected by the defendants, it will pass into the possession of the State of Oklahoma and that he cannot maintain an action or suit against said State to recover the same amount or any part thereof.

Plaintiff alleges that the official bond of the said defendant Howard is only for the sum of Five Thousand (\$5,000.00) Dollars; and that the official bond of the defendant Woolter is for the sum of Twenty Thousand (\$20,000.00) Dollars, and alleges that said de-

defendants have not sufficient property subject to execution out of which to make the amount assessed against him for income taxes, in the event he should pay said amount to them and then recover a judgment against them therefor. He further alleges that said statute if applicable to income taxes does not constitute an adequate remedy for the reason that it makes no provision for the payment of interest on the amounts paid in pursuance thereto.

Plaintiff further alleges that under the terms and provisions of Section 11 of the said Chapter 164 of the Session Laws of the State of Oklahoma of 1915, income taxes are a lien upon all of the property of persons against whom same are assessed in the State of Oklahoma. He alleges that the State of Oklahoma is without jurisdiction, power or authority to create a lien upon any of his property for taxes, other than that assessed against the property itself, and that the provisions of said Section 11 deprives him of property without due process of law in violation of the 14th Amendment to the Constitution of the United States and that the same is unconstitutional, null and void; and he alleges that the attempt as made by said Section 11 and by the proceedings hereinabove referred to to affix a lien upon his said property, deprives him of the equal protection of the laws in violation of the 1st Section of the 14th Amendment to the Constitution of the United States, for the reason that it attempts to enforce a remedy against him that it does not have and cannot enforce against persons engaged in business in the State of Oklahoma who have no permanent investments therein. He alleges that he owns certain land in Creek County, Oklahoma, in fee simple and that said assessment and said tax warrant constitute a cloud upon his title to said land, and that said levy and said tax warrant also constitute a cloud upon the title to all of his personal property in the State of Oklahoma and particularly in Creek County, Oklahoma.

Plaintiff alleges that he is the owner of various oil and gas mining leases covering lands in Creek County, Oklahoma, and that he is advised that it is a matter of great doubt as to whether said leases are real or personal property in Oklahoma, but he avers that said leases, in principle, constitute an interest in real property and he alleges that the defendants are asserting and claiming a lien upon all of his said property by virtue of said levy and tax warrant, and he alleges that said assessment and warrant create a cloud upon his title to all his property in Oklahoma, and particularly upon his lands and oil and gas mining leases in Creek County, Oklahoma.

Plaintiff alleges that he is without a plain, adequate and complete remedy at law against the defendants to prevent the collection of said sum of money, or to recover same if paid.

Wherefore, plaintiff prays that a temporary restraining order be granted enjoining and restraining the defendants, and each of them, from further proceeding to levy said tax warrant and from attempting to collect said sum of money attempted to be assessed against him, until such time as the application for a temporary injunction may be

heard, that upon such hearing an interlocutory injunction may be granted, enjoining and restraining the defendants and each of them from levying said tax warrant and from claiming or demanding from the plaintiff said sum of money so attempted to be levied as taxes during the further pendency of this action, and that upon final hearing, the defendants and each of them, be enjoined and restrained from further attempting to levy said tax warrant and from further attempting in any way to collect said sum of money so attempted to be levied and from claiming or demanding said sum of money from the plaintiff; and plaintiff further prays judgment for costs of suit and all proper relief.

GEO. S. RAMSEY,
EDGAR A. DE MEULES,
MALCOLM E. ROSSER,
VILLARD MARTIN,
J. BERRY KING,

Solicitors for Plaintiff.

17 Endorsed: Filed Nov. 3, 1917, R. P. Harrison, Clerk
United States District Court, Eastern District of Oklahoma.

And, to-wit, on the 28th day of September, A. D. 1917, the same being one of the days of a special session of the United States Court for the Eastern District of Oklahoma, held at Muskogee, Oklahoma, Court met pursuant to adjournment. Present and presiding the Honorable Ralph E. Campbell, Judge.

Among the proceedings had on this day is the following:

Temporary Restraining Order.

On this 28th day of September, A. D. 1917, comes on to be heard the application of the above named plaintiff, Charles B. Shaffer, for a temporary order in the above entitled action, enjoining and restraining the above named defendants, E. B. Howard, State Auditor, and John S. Woofter, Sheriff of Creek County, Oklahoma, from levying or attempting to levy a certain tax warrant issued by the above named defendant, E. B. Howard, State Auditor, for the collection of the income tax claimed to be due from the said Charles B. Shaffer to the State of Oklahoma, for the year 1916, which warrant is now in the hands of the defendant, John S. Woofter, Sheriff of Creek County, Oklahoma; and, after hearing the Bill of Complaint in said action, and the application for a temporary restraining order, and the evidence in support thereof, the Court finds that the temporary restraining order should issue:

It is, therefore, by the court considered, ordered and ad-
18 judged that the defendants, E. B. Howard, State Auditor, and
John S. Woofter, Sheriff of Creek County, Oklahoma, be, and
they are, hereby enjoined and restrained from proceeding further to
levy said tax warrant and from further attempting to collect the sum

of money ordered to be collected by said tax warrant until the further order of the Court; and

It is further ordered, that the time and place for hearing the application for an interlocutory injunction in the above entitled action be, and the same is, hereby fixed for the 8th day of October, 1917, at ten o'clock A. M., at the United States court-room in Ardmore, Oklahoma; and

It is further ordered that the above temporary restraining order shall not become effective until the above named plaintiff, Charles B. Shaffer, shall execute a bond to the defendants, conditioned as required by law, in the sum of Ten Thousand Dollars to be approved by the Judge of this Court.

RALPH E. CAMPBELL, *Judge.*

19 And, thereafterwards, to-wit, on the 19th day of October, A. D. 1917, the defendants filed Plea to the Jurisdiction, which is in words and figures as follows:

Plea to the Jurisdiction.

Come now the defendants, E. B. Howard, State Auditor, and John S. Woofter, Sheriff, and appearing for the purpose of this plea, and no other purpose, say that the Court has no jurisdiction of this action, for the following reasons, to-wit:

First. That the plaintiff has a plain, adequate and complete remedy at law, and that his said petition does not state facts sufficient to confer jurisdiction upon a Court of Equity.

Second. That said petition does not show that said plaintiff will suffer irreparable injury by the alleged action of the said defendants, nor that said action will result in a multiplicity of suits, nor that a cloud will be cast upon the property of plaintiff.

Wherefore, defendants ask that said action be dismissed for the reason that said Court has no jurisdiction to hear and determine same.

E. B. HOWARD,
State Auditor.

JOHN S. WOOFTER,
Sheriff.

S. P. FREELING,
Attorney General.

C. W. KING,
Assistant Attorney General.

Endorsed: Filed Oct. 19, 1917. R. P. Harrison, Clerk United States District Court, Eastern District of Oklahoma.

20 And, to-wit, on the 31st day of October, A. D. 1917, the Defendants filed Answer herein, which is in words and figures as follows:

Answer to Plaintiff's Bill.

Come now the defendants, E. B. Howard, State Auditor, and John S. Woofter, Sheriff, and answering the bill of plaintiff filed herein, says:

First. That the Court has no power or jurisdiction to entertain the bill of plaintiff herein and grant the relief prayed for, for the reason that plaintiff has a plain, adequate and complete remedy at law, as provided by the income and general tax acts of the State of Oklahoma, which provide for an action at law wherein the matters alleged in plaintiff's bill may be fully determined.

Second. That plaintiff does not show himself entitled to equitable relief upon either of the grounds upon which equitable jurisdiction depends, in that he does not show that irreparable loss or irremediable damage will ensue, or that a multiplicity of suits will follow, or that a cloud will be cast upon his property and that he will be
21 damaged thereby, or any other ground of equitable cognizance.

Third. Plaintiff does not allege that he has sustained any losses in his business carried on in any other state so as to be entitled to any reduction on that account, and is therefore not entitled to be heard to complain upon that ground.

Fourth. For further answer to plaintiff's bill, defendants deny each and every allegation thereof, except the following, which are admitted:

Defendants admit that plaintiff is a resident of the State of Illinois; that defendants are residents of the State of Oklahoma, and occupy the official positions as stated in plaintiff's bill; that the State Auditor is charged with the duty of collecting the income taxes due the State of Oklahoma under its laws; that the plaintiff is and has been during the calendar year of 1916 engaged in business in the State of Oklahoma, from which business so carried on in said State, he has received a net income of \$1,562,647.96, during the calendar year of 1916; that the *the* statutory time for making report of his income in said State was extended by the Auditor, and that when same was filed, and payment of the tax refused for the reasons therein stated, the said Auditor issued a tax warrant against the property of the said plaintiff as directed by law, and delivered the same to the defendant sheriff for execution and return; and that no part of the tax alleged to be due from plaintiff to the State of Oklahoma has
' been paid.

Fifth. Defendants deny that the laws of the State of Oklahoma, under which it is sought to collect the income tax from plaintiff, are void for the reasons alleged by plaintiff or for any other
22 reason, and deny further that said laws work a discrimination against the plaintiff in favor of citizens of the State of Oklahoma.

Sixth. Defendants allege that the property or business from which plaintiff derives his income in this State is not of an intangible nature, but that the oil and gas produced by plaintiff are reduced to physical

possession by said plaintiff, or his agents and employees in this State and, when sold, delivery thereof is made from within this State the same as any other physical property produced within the State, and that the situs of the income derived from said business is within the State of Oklahoma.

Seventh. Defendants deny that the State Auditor refused to accept payment of the tax as alleged by plaintiff, and avers that no tender thereof was made by plaintiff to said Auditor. Defendants further deny that the official bond of said Auditor is only \$5,000.00, but allege the fact to be that the amount of said bond is \$50,000.00, and has been duly executed, approved and filed by said Auditor, as provided by law.

Wherefore, defendants pray the judgment of said Court.

E. B. HOWARD,

State Auditor;

JOHN S. WOOFER,

Sheriff,

Defendants,

By S. P. FREELING,

Attorney General, State of Oklahoma.

C. W. KING,

Assistant Attorney General.

23 STATE OF OKLAHOMA,
County of Oklahoma:

E. B. Howard, one of the defendants in the above action, after being duly sworn, upon oath says that he has read the foregoing answer, and that the matters of fact therein stated are true.

E. B. HOWARD

Subscribed and sworn to before me this 1 day of November, 1917.

[SEAL.]

W. W. WITT,
Notary Public.

My commission expires April 16, 1919.

Endorsed: Filed Oct. 31, 1917, R. P. Harrison, Clerk United States District Court, Eastern District of Oklahoma.

24 And, to-wit, on the 3rd day of November, A. D, 1917, the Plaintiff filed affidavit herein, which is in words and figures as follows:

25 STATE OF ILLINOIS,
County of Cook, ss:

Before me, Else H. Lochner, a Notary Public within and for said County and State, personally appeared Charles B. Shaffer, who being first duly sworn under oath, made the following statement:

I am a resident of the City of Chicago, in the State of Illinois,

and have been a resident of the said City and State for more than five years last past. I have an office in the Fort Dearborn Bank Building, at 76 W. Monroe Street, in said City and State.

I am now engaged in the production of oil in several states of the United States and have been engaged in the oil business for a number of years. I am engaged in the production of oil in the State of Oklahoma and have been producing oil in said State since 1904 or 1905. I first began taking leases in 1904 on the Indian Territory side of Oklahoma.

I have purchased, owned, developed and operated a number of oil and gas mining leases in the State of Oklahoma, and I am the owner in fee simple of a small amount of land in said State, from which oil is produced, but not more than one per cent. of the total oil produced by me in said State is produced from land owned by me in fee simple, and probably considerably less than one per cent.

My principal office is in the Fort Dearborn Bank Building at 76 West Monroe Street, Chicago, Illinois, and all of the matters connected with the business of producing oil in Oklahoma, except the actual drilling, pumping and field work, are handled from said office.

26 Practically all of my sales of oil are authorized and made by me in Chicago, and practically all of my purchases are made by me from my office in Chicago. Nearly all of the supplies necessary for the business are purchased in Pittsburgh and other manufacturing centers and shipped to Oklahoma and the contracts for such supplies or the orders for such supplies are given by me in Chicago. The only purchases that are made in Oklahoma are the fittings of a small value that are sometimes purchased by the field men, and also lumber for drilling rig purposes. I use some steel rigs, and where I do, I buy the steel rigs outside of the State of Oklahoma.

Since I have been engaged in the oil business in Oklahoma, I have sold practically all of the oil produced by me to the Prairie Oil & Gas Company, Consumers Refining Company, the National Refining Company, and the Pierce Oil Corporation. The greater portion of the oil has been sold to the Prairie Oil & Gas Company and the Consumers Refining Company. The oil that I sold to the Prairie Oil & Gas Company was sold on Division Orders which were signed by me in Chicago. The Prairie connected its lines to my field tanks on the leases and received the oil there. I cannot say to what point they pipe the oil but I know that they have no refinery in Oklahoma and have every reason to believe that the oil was piped out of the State.

The oil received by the Consumers Refining Company, is piped by me to the tank farm of that company at Cushing and delivered in its tanks. The Consumers Refining Company is a West Virginia corporation and has its principal office in the City of Chicago, State of Illinois, and the contract for the sale of my oil to said
27 company is made in Chicago. The oil that is delivered by me to the Consumers is refined by that company at its refinery in Cushing and the refined product is shipped out of Okla-

homa as rapidly as cars can be obtained for shipping the products and as fast as a market can be obtained. During the past two or three years there has always been a market for the entire product and the only thing that has prevented the shipment of the products of the Consumers Refining Company as fast as manufactured has been inability to obtain facilities for shipping.

The oil I sold the National Refining Company went to their plant in Coffeyville, Kansas, some of it was delivered by me in the pipe line of the Milliken Pipe Line Company and some was shipped in tank cars. The contract with the National Refining Company was executed by me in Chicago.

The oil sold by me to the Pierce Oil Corporation was taken from tanks off the property. The contract with the Pierce Oil Corporation for the sale of this oil was made by me with that company in New York. The purchase price of all the oil sold by me to all of said companies was received by me at my office in the City of Chicago. I cannot now remember any sales to any person or corporation except those mentioned, during the year 1916. If I made sales to any one else, the sales were very small and very unimportant. During the present year I have sold a little oil to a man named Hillman. The greater portion of my sales to him was made pursuant to an agreement between me and the Sinclair Oil Company with reference to disposing of the oil produced from a lease known as the Marks lease, which is in litigation.

The payments for the oil that I sold the Prairie Oil & Gas Company during 1916 and all the time since I have been engaged in the business in Oklahoma, were drawn at Independence, 28 Kansas, on the First National Bank of New York City, except possibly a few checks which were drawn at Independence, Kansas, on some bank in Kansas. I know that no check that I have received from the Prairie Oil & Gas Company has been drawn on an Oklahoma bank.

The Consumers Refining Company has paid for all oil sold by me to it by check drawn in Chicago on a Chicago bank.

The Pierce Oil Corporation paid for oil sold by me to it by check drawn either in New York or St. Louis, I am not sure which and do not remember at what bank it was payable.

The National Refining Company paid for oil sold by me to it by check drawn at its office in Cleveland, Ohio, on some bank in Cleveland, I do not now remember the bank. I have been in the oil business practically all my business life. The oil business has always been my principal business and was the first business I ever engaged in. I give my personal attention to this business. I give my entire time, energy and business judgment to the production of oil. Successful operation of the oil business requires business skill and judgment and good management. Without proper management, the oil business will be as great a failure as any other class of business, and the amount of profits derived from it depend almost entirely upon the skill and ability with which it is managed.

The course of business hereinabove described was begun before Oklahoma was admitted into the Union and has continued ever since.

There has been no change in the method of managing the business since the admission of the State into the Union and no change since any of the legislation of the State with reference to taxation has been put in force in that State. I have paid to the State of Oklahoma, the three per cent gross production tax provided by
29 the statutes of said State on all of the oil produced by me since that statute went into effect. I have read what was shown me as a copy of bill of complaint brought by me against E. B. Howard and John S. Woofter to prevent the collection of income taxes claimed by the State of Oklahoma against me, and the statements of fact therein contained are true.

I consider my business in the various states as one business and have used the income from the entire business to make development in different states. I sustained considerable losses from the oil business in 1916 in Kansas, Texas, and Wyoming, and I also lost some money on other investments outside of Oklahoma in the year 1916. I sustained a net loss in Kansas, Texas and Wyoming, together with certain notes that I had become security on and had to pay during that year, amounting altogether to about \$290,000.00.

There has been a large decline in the production of oil from the properties producing oil in 1916 since the year 1916. I produced on the same properties in January, 1917, 23,000 barrels less oil than I produced in January, 1916. I produced in April, 1917, 79,811 barrels less oil from the same properties than I produced in April, 1916. I produced in August, 1917, 233,434 barrels less oil than I produced from the same property in August of 1916.

An oil and gas property does not produce indefinitely. When the oil is once taken out of land producing oil, it is gone and the investment goes with it. The income from oil and gas property is altogether different to the income from the loan of money or the rental of a building, which continues practically indefinitely. In

order to keep up oil production, it is necessary to continue a
30 reinvestment of proceeds of the property and that has been my custom ever since I have been in business. I have never sold undeveloped leases. I have always developed if I thought a lease had oil value and where I did not consider it worth developing, I have surrendered it.

C. B. SHAFFER.

Subscribed and sworn to before me this 15th day of October, A. D. 1917.

[SEAL.]

ELSE H. LOCHNER,
Notary Public.

My commission expires May 23, 1918.

Endorsed: Filed Nov. 3, 1917, R. P. Harrison, Clerk United States District Court, Eastern District of Oklahoma.

31 And, to-wit, on the 31st day of October, A. D. 1917, the following proceedings were had in this cause. The Hon-

orable Kimbrough Stone, Circuit Judge of the Eighth Circuit, Honorable John H. Cotteral, Judge of the District Court of the Western District of Oklahoma and Honorable Ralph E. Campbell, Judge of the District Court of the Eastern District of Oklahoma, presiding.

Order Submitting Cause.

Now on this 31st day of October, 1917, it is ordered that the temporary injunction be and the same is hereby submitted on briefs. Plaintiff given 5 days to file brief. Defendants given 5 days thereafter to file reply brief. It is further ordered that the temporary restraining order be and the same is hereby continued in force.

And, to-wit, on the 4th day of February, A. D. 1918, the opinions of the Court were filed and are in words and figures as follows:

32 STONE, *Circuit Judge*:

This case is an injunction brought by a non-resident of the State of Oklahoma, seeking to enjoin as invalid the enforcement of the state income law taxing that portion of the income of non-residents which is derived from sources within the state. The instant decision arises upon an application for a preliminary injunction.

That State Statute (Session Laws 1915, p. 282) provides in Section 1 that:

"Each and every person in this state, shall be liable to an annual tax upon the entire net income of such person arising or accruing from all sources during the preceding calendar year, and a like tax shall be levied, assessed, collected and paid annually upon the entire net income from all property owned, and of every business, trade or profession carried on in this state by persons residing elsewhere."

The tax here involved was imposed under authority of the latter part of this section upon the income derived by the plaintiff from the production of certain oil wells operated under an oil lease. The plaintiff lives in Chicago, Illinois, from which place he directs this business.

At the threshold of the case is the claim of want of equity because of an adequate remedy. This point is not well taken. Also the petition raises a point that the later Gross Production Tax
33 law of the state had displaced the income tax law insofar as incomes from oil properties. This point was not pressed at the hearing and, presuming it abandoned, we pass it by.

This leaves the question of the validity of the law. This is based on the claims that an income tax is a kind of a taxation differing in its basic principles from all other taxation; and, as such, being a law levied against the person who receives the income, is invalid because he is a non-resident; or, if levied against the income, is still void because the income is made up from two inseparable elements—the property and the owner's management or intelligence—and the latter of these is outside the state.

It is claimed that income taxation is a generic kind of taxation, different from all other taxation, and resting upon an entirely different basis. That income taxation is a separate and distinct form of exercising the sovereign power of taxation is evident. That the right to its employment rests upon a basis different from that of other modes of raising revenue does not follow. Laying aside political considerations, such as gave rise to the War of the Revolution, there is but one theory of right to tax underlying all taxation—that of protection or benefit rendered by the State to persons, property or business. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 202; *Cleveland, P. & A. R. Co. v. Pennsylvania*, 15 Wall. 300, 319. Within constitutional limits, the choice of any particular form of taxation is a practical legislative problem. Certain classes of taxation have adherents who urge certain consideration, based upon their ideas of just and practical results in taxation. One such class is income taxes, and

34 its sponsors urge its employment on the theory that it places the burden of government upon those most able to bear it. This may be a reason why the legislature should choose income taxation as a revenue-raising method. It forms no new basis for a right of taxation itself. It refers solely to a choice of methods, all of which rest upon a common basis. The right to tax an income rests upon the protection or benefit given that income by the state.

The next contentions of plaintiff are related in thought, and will be considered together. They are based upon the idea that the entire income, or at least a material, inseparable, component part thereof (the directing or managing intelligence), is without the jurisdiction of the state of Oklahoma. The income here involved arose solely from production of oil wells and appliances within the state of Oklahoma, managed by plaintiff from his city of residence, Chicago, Illinois. Unless the state has given protection or benefit to this income, it has no reason or right to ask contribution therefrom. *McCulloch v. Maryland*, 4 Wheat. 316, 429; *Cleveland, P. & A. R. Co. v. Pennsylvania*, 15 Wall. 300, 319; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 202.

Plaintiff says no such protection has here been given because the levy is "a tax on this plaintiff because of his income." In one sense all taxes might be said to be a tax on the taxpayer because of his land or of his personalty or of his business or of some privilege. But what the plaintiff means, as he says further in his brief, is that "the tax is directed against the individual and not against the property." By way of further elucidation, he quotes with approval from *State ex rel. Sallie F. Moon Co. v. Wisconsin Tax Commission*, 163 N. W.

639, a portion of which is that "it is the recipient of the income tax that is taxed, not his property * * * the tax is upon the right or ability to produce, create, receive and enjoy, and not upon specific property." It does not necessarily follow from this definition that the plaintiff is subject to income tax only in the state of his residence. It means, rather, that he is subject to income taxation only in those jurisdictions which protect him in the production, creation, receipt and enjoyment of his income.

If he lives in Illinois and has in Oklahoma the property or the business from which his income flows, does not the latter state truly protect him in the privilege of producing, creating, receiving and enjoying that income when it permits and protects his business, from which the income flows? How is that affected by his residence? Both the property in Oklahoma and the intelligence in Illinois contributed to this income. Each was necessary to the result. Each had protection from the state in which it was. It is impossible to separate the two elements for taxation purposes. It is impossible, if material, to determine which was most potent in the result. Can either estate be told it cannot be compensated for its protection of a necessary component element of this income, or that it cannot measure such compensation by that income? If through accident or design an individual dwells in one state, while his business is in part or wholly located in other states, so that he needs, commands and receives the protection of several states, can his income therefrom escape imposition? It may be true that the state which protects the person of the one who creates, receives or enjoys an income may require of him therefor a tax measured by his ability to pay from his entire income. That is no reason why the state which protects the business which contributes to his income may not

36 also demand as pay for that protection a tax measured by that part of his income which came from that business. If in the one case the state of residence can tax the right to create, receive and enjoy an income, why cannot another state tax his right to create and receive an income from business within its borders?

A tax upon an income of the instant character (from a business) is directed at neither the person who receives nor the property from which the income arises, but at the privilege of making, producing, creating, receiving and enjoying the income itself. The right to lay such tax depends upon the protection of the person who receives or of the business which helps create that income.

There is nothing new in this conception of a non-resident being taxed for rights or privileges he exercises under the protection of another state. Inheritance taxes are illustrations. *Mager v. Grima*, 8 How. 490; *Scholey v. Rew*, 23 Wall. 331. Such a tax is levied against the non-resident as well as the resident because of his inheritance—the state protects him in that privilege. Occupation or business taxes are also illustrative. And this would be so because the state of Oklahoma permits him to carry on his business within the state, and protects him therein, irrespective of whether he lives within or without the state, or manages the business from within or without the state. When he can be properly taxed for the privilege of inheriting the property or carrying on a business within another state, why cannot he be taxed upon an income he derives from business within the state, when a tax upon such an income as this is a levy on the privilege of producing, creating, receiving and enjoying an income? It is true the tax on the income is not

37 upon the business conducted, but it is also true that the income springs therefrom, and, following the situs thereof, as the child takes legally the residence of the parent, it carries the right of taxation with it.

Such an income of a non-resident is taxable not only because it fits in with the theory of the right of all taxation, i. e. protection, but for another reason. The situs of things and choses in action and legal rights rests in many cases upon a legal fiction. The necessity of avoiding confusion, inconvenience or injustice arises in some instance, and the law settles upon a so-called situs. Familiar illustrations are: A married woman ordinarily partakes of her husband's nationality and domicile; the law of the domicile controls the descent of personality; any many others to be found in the realm of private international law. These questions arise where there are conflicting claims of jurisdiction. Their settlement depends often, if not usually, upon broad considerations of public policy and justice. One main test in determining the public policy and justice of a situation is to examine the possible or probable effect of a particular holding. If the above view of this tax taken by the court does not prevail, there will result the possibility of avoidance of state income taxes. This latter through the possibility of taking up residence in a state with little or no taxation of that sort. Income taxation is too valuable and important a method of exercising the sovereign power of taxation to risk any diminution through a choice of residence at the hands of the party taxed, who at the same time maintains his property and business as before. The public good requires its preservation in its entirety. As said by Mr. Justice Field (*The Delaware Railroad Tax*, 18 Wall. 206, 226): "The power of taxation is an attribute of sovereignty,

and is essential to every independent government. As this
38 court has said, the whole community is interested in retaining it undiminished, * * *."

In addition to the above theory of taxation and public policy considerations there is another thought which, while not controlling, has a persuasive force. That is the history of our national income laws. Our first income tax law sprang from the early exigencies of the Civil War. The Act of August 5, 1861 (12 St. 292, 309, Sec. 49) taxed incomes of residents and those derived from property in United States belonging to citizens of United States residing abroad. That of July, 1862 (12 St. 432, Sec. 84) provides for tax on gross receipts for insurance premiums "and like duty shall be paid by the agent of any foreign insurance company having an office or doing business in the United States." The Act of June 30, 1864, (13 St. 223, Secs. 105, 116) followed the two preceding laws. The Act of July 4, 1864 (13 St. 417, Sec. 116) continued the tax as to residents and non-resident citizens. The Act of July 13, 1866, (14 St. 98, Sec. 9) amended Sec. 116 supra "and a like tax shall be levied, collected and paid annually upon the gains, profits, and income of every business, trade, or profession carried on in the United States by persons residing without the United States, not citizens thereof." This Act also amended Sec. 122 of the June 30, 1864, act, which taxed bond coupons, interest and dividends of railroads, canals, turnpike, etc., companies by inserting as to bond or stockholders the words "including non-residents, whether citizens or aliens." The Act of March 2nd, 1867 (14 St. 471, 477, Sec. 13) followed Sec. 166 supra, as

amended "and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income of every business, trade or profession carried on in the United States, by persons residing without the United States, and not citizens thereof." The Act of July 14th, 1870, (16 St. 256, 257, Sec. 6) covered incomes of residents, non-resident citizens, "any business, trade or profession carried on in the United States by any person residing without the United States, and not a citizen thereof," and "rents of real estate within the United States owned by any person residing without the United States and not a citizen thereof." Section 15 of this Act provided for a tax on coupons, interest and dividends "to whatsoever person the same may be due, including non-residents, whether citizens or aliens." There followed an hiatus in this sort of taxation until the Act of August 28th, 1894, (28 St. 509), which provided (Sec. 27) for a tax on incomes of citizens, whether resident or non-resident, and on "all property owned and of every business, trade, or profession carried on in the United States by persons residing without the United States." Section 31 provides that "any non-resident" may have benefit of certain exemptions by filing tax statements and "In computing income he shall include all income from every source, but unless he be a citizen of the United States he shall only pay on that part of the income which is derived from any source in the United States. Non-resident corporations under same liability as resident. The Act of August 5, 1909, (36 St. 112, Sec. 38) covers income of corporations, "or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its territories." The Act of October 3rd, 1913, taxed incomes of citizens (resident or non-resident), of residents and from property, business, etc., in United States of non-residents (not citizens). The Act of Sept. 8th, 1916, (39 St. Part 1, p. 756, Sec. (a)) imposes such tax on the income of citizens and of residents of the United States and upon income received "from all sources within the United States by every individual, a non-resident alien." The Act of October 3rd, 1917, continues the tax of the Act of 1916, increasing it as to some classes, and by Section 200, defining the terms used in connection with War Excess Profits Tax, provides that "The term 'net income' means in the case of a foreign corporation or partnership or a non-resident alien individual, the net income received from sources within the United States." While some of the above references go outside of income taxes, such exceptions are illustrations in kindred fields. And all show an unbroken legislative policy (beginning with the Act of July 3rd, 1866, and extending through the Act of 1917) to tax the incomes of non-resident aliens in so far as derived from sources within the United States. There has been but one judicial challenge of this asserted right. In *Railroad Co. v. Jackson*, 7 Wall. 262, although the validity of the income tax law of June 30th, 1864, was questioned, in so far as reduction of interest was concerned, by a non-resident alien railroad bond-holder, the court held that the act

under consideration did not include such a person within its terms, saying:

"It is not important, however, to pursue the argument, as Congress has since, in express terms by the acts of March 10th, and July 13th, 1866, imposed a tax on alien non-resident bondholders. The question hereafter will be, not whether the laws embrace the alien non-resident holder, but whether it is competent for Congress to impose it; upon which we express no opinion."

Mr. Justice Clifford (Mr. Justice Swayne concurring) dissented, saying:

41 "I dissent from the opinion and judgment of the court in this case, because I think the taxes in question, both State and Federal, were legally assessed, and that the officers of the railway company properly deducted the same from the amount of the coupons described in the declaration."

So that, as far as there has been any expression upon the validity of such provisions, they have been approved. There is no reason why the situs of an income is any different when the tax is national instead of state. The relative positions of the non-resident alien and the state non-resident are, in this respect, identical. If the income is, for taxation purposes, only where the recipient resides, then the United States can no more tax the income of a non-resident alien than a state can that of a non-resident. There is common to both the same reason that no sovereignty can properly tax something not within its jurisdiction in the sense of not being under its protection. As said by Chief Justice Marshall, in *McCullock v. Maryland*, 4 Wheat. 316, 429, in speaking of the state power of taxation:

"It may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident."

It is inconceivable that the National Government would, under the guise of taxation, practice what, without such situs and power, would, in the language of Justice Brown, amount to extortion. (*Union Transit Co. v. Kentucky*, 199 U. S. 194, 202). This history of the long assertion and acceptance of the power in a government to tax an income produced in or arising from sources within its jurisdiction, though such income belong to one foreign in citizenship and residence, is strongly persuasive of its existence. As said by Chief Justice Marshall in the case just quoted (page 401), in speaking of the long unchallenged legislation concerning the old National Bank. "An exposition of the constitution, deliberately established by legislative acts, on the faith of which an

immense property has been advanced, ought not to be lightly disregarded." And as said by Justice Chase, in considering whether a tax upon carriages was a direct tax within the constitution (*Hylton vs. U. S.*, 3 Dall. 171).

"The deliberate decision of the national legislature (Who did not consider a tax on carriages a direct tax, but thought it was within the description of a duty), would determine me, if the case was doubtful, to receive the construction of the legislature."

To this national history may be added the fact that in every state income tax which has been brought to our attention there is the same provision levying on non-resident incomes from sources within the state. Hawaii (Laws Apr. 30, 1901, Sec. 1), Missouri (Laws 1917, p. 524, Sec. 1), South Carolina (Civil Code 1912, Vol. 1, p. 130, Sec. 354) and Wisconsin (Laws 1911, Ch. 658, Sec. 3).

In what has been said above in reference to the character of an income tax being in the nature of an excise or privilege levy, the two decisions in the case of *Pollock v. Farmer's Loan & Trust Company* (157 U. S. 429 and 158 U. S. 601) have not been overlooked. That case determined that income taxes from real estate ("rents, or products, or otherwise") and from personal property ("Bonds, stocks, or other forms of personal property") was a direct tax within the meaning of the national constitution, and that such a tax upon municipal bonds was invalid "because of want of power to tax the source." The facts of the present case place it without the three classes included in that decision. This income is derived from the prosecution of an oil business consisting of the mining, production and marketing of oil under a lease for that purpose. If it is not so excluded, then under that decision there could be no question of the right to tax; for although the question in that case was, in this respect, as to the meaning of constitutional terms, yet its determination turned on the identity or close relation between the income and the property which produced it (158 U. S. at 629). Viewing this case as without the decision of that case, yet there are expressions therein which seem to sustain the theory that the tax upon this income is a privilege tax, and within the rule of *Springer v. U. S.*, 102 U. S. 586. In the later opinion the court (158 U. S. 635) says:

"We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such."

In the earlier opinion (157 U. S. at 578), in commenting on the *Springer* case, the court says:

"The original record discloses that the income was not derived in any degree from real estate but was in part professional as attorney at law and the rest interest on United States bonds. It would seem

probable that the court did not feel called upon to advert to the distinction between the latter and the former source of income, as the validity of the tax as to either would sustain the action.

"The opinion thus concludes: 'Our conclusions are that direct taxes, within the meaning of the Constitution, are only capi-
44 tation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty.'"

"While this language is broad enough to cover the interest as well as the professional earnings, the case would have been more significant as a precedent if the distinction had been brought out in the report and commented on in arriving at judgment, for a tax on professional receipts might be treated as an excise or duty, and therefore indirect, when a tax on the income of personalty might be held to be direct."

The conclusion therefore is that the state had jurisdiction to levy an income tax against a non-resident upon that portion of an income of this character derived from sources within the state.

The provisions of the law creating a tax lien upon all property in the state is not subject to attack. It does not pretend to create a personal liability, and the lien is no broader than the tax which is based upon the income from all property, business, etc., in the state. Note *Scholey v. Rew*, 23 Wall. 331, for statute with similar provision.

Nor does the law discriminate against non-residents. It can only cover such incomes as arise from property with- Oklahoma. He is permitted the privilege of making an income in Oklahoma upon as near the same basis afforded residents as is possible to devise.

The preliminary order should be denied.

45 Endorsed: Filed Feb. 4, 1918, R. P. Harrison, Clerk.
United States District Court, Eastern District of Oklahoma.

46 COTTERAL, *District Judge* (specially concurring):

The two questions argued upon the pending motion pertain to the equity jurisdiction of this court and the validity of the tax in controversy.

It is contended that by Section 9 of the Income Tax Act, sections 2 and 7, Sub. B. Art. 1, Ch. 107, Session Laws of 1915, relating to ad valorem taxation, are made available to plaintiff as an adequate remedy by state law. Section 2 allows a hearing, upon evidence, before the county board of equalization, and an appeal by transcript to the district court. Section 7 provides for payment and suit, where the action had is not subject to appeal. But section 9 of the Income Tax Act does not purport to make those sections applicable to income taxes. It provides only that the Auditor may revise returns and hear complaints, with equivalent powers and by like remedy and proceedings, as the county board of equalization. His action was invoked by the plaintiff in the way thus authorized. As the terms of section 9 are plain, and it defines the course open to

the plaintiff, by familiar rule it cannot be interpreted as contemplating any other remedy.

A sale by the sheriff under the tax warrant authorized by section 10 of the Act, pursuant to Section 7392, Revised Laws of 1910, would divest title as in case of executions. This would not, however, justify an equitable remedy, as the mere enforcement of an illegal tax by process constitutes only a trespass for which the law is presumed to give an adequate remedy, as decided in *Shelton v. Platt*, 139 U. S. 591, and many other cases to the same effect. But by section 11 the tax is declared to be a lien on all the property of the delinquent, and as the plaintiff's property consists partly
47 of land, although mainly of leases, jurisdiction was acquired to free the land of the tax lien. And whether otherwise

sustainable in view of the character of mineral leases in this state, it should be retained in order to determine the entire controversy over an integral assessment. The plaintiff therefore is entitled to pursue a remedy in equity to obtain an adjudication upon the validity of the tax. *Ohio Tax Cases*, 232 U. S. 576. *Green v. Louisville & Interurban R. R.*, 244 U. S. 499.

On the merits, the complaint is that the situs of the income is in whole or in part beyond the limits of the state, and that there is a discrimination as between residents and non-residents. Primarily, the taxation of incomes is well within the taxing power of a state. But a proper classification of this tax is no doubt vital in determining whether it is to be upheld. That it is not a property in the ordinary sense is clear, as taxes of that character are otherwise authorized by the State's Constitution, and the income tax is laid on earnings from both property and business. Obviously, it is meant to be the same kind of a tax upon income from either source, and it could not be so, if laid on the property yielding the returns. If it should be finally decided in this state that it is a tax on the recipient only, then doubtless its situs for taxing purposes would be at his domicile. But "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score." *United States v. Jin Fuey Moy*, 241 U. S. 394.

With that guiding rule in view, this income tax may well be classified under the broad terms of the State Constitution of Oklahoma, as a special tax on income of non residents as property having a situs within the taxing jurisdiction of the state, and
48 as being sustained because arising from property or operations or both in the state and the advantages and protections afforded thereto by its laws. Section 12 of Article 10 of the Constitution in authorizing income taxes does not define their precise character, but wisely leaves it as well as the method of imposition, wholly to the legislature, and neither that section nor the Income Tax Act specifies that the income tax shall be regarded as a tax on the recipient. This interpretation is deemed to be quite in harmony with the views of the State Supreme Court, as manifested in its decisions.

The State lays this burden on an asset or species of property orig-

inating in the state, although it may be intangible for a period, and its exact and ultimate value may be realized later, perhaps outside of the state. See *Adams Express Co., v. Auditor*, 166 U. S. 185. This may be a liberal exercise of the taxing power, but the power exists and it is all sufficient to sustain the tax. A debt owing on a bank deposit in Missouri to a citizen of Kentucky is taxable in both states. *Fidelity & Columbia Trust Co. v. City of Louisville*, — U. S. — (Nov. 5, 1917). The Jurisdiction of the state of domicile "over a creditor's person, does not exclude the power of another state in which he transacts his business, to lay a tax upon the credits there accruing to him against resident debtors or thus to enforce contribution for the support of the government under whose protection his affairs are conducted." *Liverpool, etc., Ins. Co. v. Orleans Assessors*, 221 U. S., 346. And the power to tax is evidently not ruled by the place of payment. Upon like principle, the receipt of income outside of this state does not control the validity of the tax.

49 The element of personal ability or services in acquiring the income may be disregarded. It enters into all income and causes the returns from an occupation. But it has not been deemed important in the taxation of property, and need not be deducted from an assessment.

No constitutional objection to the tax here involved is found from the supposed discrimination against non-residents. While the same exemptions are allowed, only a resident may deduct losses outside of the state. If a case were presented where losses of that kind had occurred, the question would arise whether the inequality was such that the tax payer might successfully complain of it. But there is no occasion to decide the question, as the plaintiff does not allege such losses and consequent prejudice. The fact that discrimination might arise does not render the law void, and that is all the plaintiff contends in his bill. A law may be good on its face but fail because of its application. *Yick Wo v. Hopkins*, 118 U. S. 356. Here the law is apparently valid, and a case of harmful application should not be assumed.

As stated, this tax should be regarded as laid upon a special kind of property consisting of the net returns from property or business in the state, and as thus classified under the State Constitution, the power of the state being established, the tax must stand. The motion for a temporary injunction is properly denied.

JOHN H. COTTERAL,
District Judge.

50 Endorsed: Filed Feb. 4, 1918, R. P. Harrison, Clerk
United States District Court, Eastern District of Oklahoma.

51 CAMPBELL, *District Judge*, dissenting:

This is a suit by the plaintiff, a non resident of Oklahoma, to enjoin the defendants from enforcing or attempting to enforce the collection of a tax assessed against him for the year 1916, by the taxing authorities of the State of Oklahoma based upon the net

income of the plaintiff for that year from his business as an oil and gas producer in the state. An application for preliminary injunction has been heard by the court, organized under the provisions of Section 266 of the Judicial Code, Honorable Kimbrough Stone, Circuit Judge, and Honorable John H. Cotteral and the writer, District Judges, sitting. Supplementing oral argument, counsel were given leave to file briefs, which have now been submitted.

At the threshold of the case it is urged on the part of the defendants that the court is without jurisdiction to entertain this action, because the plaintiff is afforded a plain, adequate, and complete remedy at law by the provisions of Section 7, Chapter 107, Session Laws of Oklahoma, 1915. A careful consideration of this section raises grave doubts as to whether it applies at all to cases involving the state income tax law, which is the subject of this controversy. At any rate, even if it may be said to apply, it cannot be said under the facts of this case to afford that adequate and complete remedy afforded by a court of equity. The relief sought presents matters clearly of equitable cognizance, and hence we conclude that this court has jurisdiction.

Upon consideration, it is the writer's conclusion that the preliminary injunction should be granted, for the reason that the state has no jurisdiction to subject a non-resident to its income tax, even though a part or the whole of the income of such non-resident may arise from property owned or business conducted by him within the state. The income tax act involved is Chapter 164 of the 1915 Session Laws, and is entitled "An Act providing for an income tax and repealing Article 17, Chapter 72, Revised Laws of Oklahoma, 1910." By Section 1 of the Act it is provided that,

"Each and every person in this state shall be liable to an annual tax upon the entire net income of such person arising or accruing from all sources during the preceding calendar year, and a like tax shall be levied, assessed, collected, and paid annually upon the entire net income from all property owned, and of every business, trade, or profession carried on in this state by persons residing elsewhere."

The taxing power of the state was defined by Justice Field in *State Tax on Foreign Held Bonds*, 15 Wallace at page 319, as follows:

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. Whatever form the taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them the taxation may be exercised in a great variety of ways."

This is now the settled law defining and limiting the state's taxing power. *Cooley on Taxation*, Vol. 1, page 25. In the case last cited, Judge Field also said:

"Property lying beyond the jurisdiction of a state is not a subject

upon which her taxing power can be legitimately exercised. Indeed it would seem that no adjudication should be necessary to establish so obvious a proposition."

In *Union Transit Company vs. Kentucky*, 199 U. S. at page 204, it is said:

"It is essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state but property which is wholly and exclusively within the jurisdiction of another state receives none of the protection for which the tax is supposed to be compensation."

In view of the foregoing well founded and indisputable rules governing the state's taxing power, it is of prime importance that we first classify the income tax under consideration; that is, determine whether it is a tax upon the person, the property, or the business of the plaintiff. The authority for laying the tax is found in Section 12 of Article 10 of the State Constitution, wherein, after providing for the taxation of tangible property, real and personal, within the State on an ad valorem basis, it is provided:

"The Legislature shall have power to provide for the levy and collection of license, franchise, gross revenue, excise, income, collateral and direct inheritance, legacy, and succession taxes; also graduated income taxes, graduated collateral, and direct inheritance taxes; graduated legacy, and succession taxes; also stamp, registration, production, or other specific taxes."

It is very plain that the framers of the state constitution had the conception of the income tax provided for as something different and distinct from a license, franchise, gross revenue, excise, legacy, or succession tax. From a reading of the Oklahoma income tax act, it is clear that so far as it relates to residents of the state, the Legislature did not intend that it should be levied upon or have any relation or reference to property or the operations of any trade or business within the state, for as to residents of the state the tax is levied upon "the entire net income of such persons arising or accruing from all sources," including or course, those without as well as those within the state; and it must be presumed that the legislature well understood that they had no power to tax property or business operations outside of the state. A resident of the state is made subject to a tax upon his net income, even though all of it arises from property or activities without the state. Taxation and protection are reciprocal. The right to tax an individual results from the general protection afforded him and his property by the state. *Cooley on Taxation*, Vol. 1, page 22. The resident of the state is subjected to the income tax for the protection the state affords his person, not his property or any right to do business in the state exercised by him; else it could not be made to extend to a resident who neither had property nor did business within the state, and by terms of the act it is a like tax which is attempted to be levied upon non-residents to the extent of their net income from property owned, and business, trade, or profession carried on in the state.

55 The Supreme Court of Wisconsin, discussing the income tax of that State, said in *Manitowoc Gas Co. vs. Wisconsin Tax Company*, 152 N. W. 848:

"Our income tax is a burden laid upon the recipient of the income, whether derived from real estate, personal property, or labor, the amount of which is determined by the amount of the total net income derived from those sources singly or combined."

The same court, in *State ex rel. Moon vs. Tax Commission*, 163 N. W. 639, said:

"Much confusion of thought arises from regarding the income tax as a tax that is levied upon or attaches to property as such, irrespective of the person sought to be taxed. It is the recipient of the income that is taxed, not his property; and the vital question in each case is, Has the person sought to be taxed received an income during the tax year? If so, such income, unless specifically exempted, is subject to a tax though the property out of which it is paid may have been exempt from an income tax in the hands of the payor. It is the relation that exists between the person sought to be taxed and specific property claimed as income to him that determines whether there shall be a tax. If the person sought to be taxed is the recipient during the tax year of such specific property as income in its ordinary significance, then the person is taxed. But the tax is upon the right or ability to produce, create, receive, and enjoy, and not upon specific property. Hence the amount of the tax is measured by the amount of the income, irrespective of the amount of specific property or ability necessary to produce or create it. In the ordinary acceptance of the terms this may be said to be a tax upon income as the statute denominates it. But the tax does not seek to reach property, or an interest in property as such. It is a burden laid upon the recipient of an income. *State ex rel. Manitowoc Gas Co. v. Wis. Tax Comm.*, 161 Wis. 111, 152 N. W. 848; *State ex rel. Bundy v. Nygaard*, 163 Wis. 307, 158 N. W. 87."

56 The Oklahoma income tax is clearly not a property tax insofar as it relates to residents of the State. As said by the Supreme Court of Wisconsin in relation to the income tax of that state, the income tax in this state, as applied to residents, does not seek to reach property or interest in property as such; it is a burden laid upon the recipient of the income. While conceding that this income tax is not a property tax, nor a tax directly imposed upon any business, trade, or profession carried on by the non-resident, counsel for defendants insist that for "jurisdictional purposes," the fact that the income subjected to the tax is derived from property or business within the state may be looked to. In their brief counsel for defendants say:

"Let us again here emphasize the fact that income has no relation to the property producing the same, nor to the business from which the same was produced, except for jurisdictional purposes alone; and

this is not peculiar to income tax alone, but applies with equal force to other forms of taxation."

But this cannot be sound. In the first place it will not do to say that this tax may be imposed upon residents of the State upon one theory, that is the protection they receive in their persons, irrespective of situs of property or business activity, and upon non-residents, over whose persons the state has no jurisdiction, upon another theory, that the income arises from certain property or business enjoying the state's protection. If the tax is one pertaining solely to the person of the taxable, as we have seen is clearly the case in relation to residents, then it cannot be imposed upon non-residents, for they are not within the taxing power of the state, so far as their persons are concerned. This was evidently in the minds of the legislators and hence they attempted to bring their incomes within the state's jurisdiction to tax them by attempting to relate them to the sources within the state from which they might be derived. But this, while denominated an income tax, is in reality a tax upon the property or business producing the income, measured by the income. The basis of such tax must be the protection which the state affords the property or business; and no mere legislative nomenclature can

57 make it other than a tax upon such property or business.

While the declaration of the law-making power, as to the character of the tax involved, is entitled to much weight, the mere declaration contained in a statute that it shall be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so designated consistently with the meaning and effect of the act. *Flint vs. Stone-Tracy Co.*, 220 U. S. at page 145. In *Knowlton vs. Moore*, 178 U. S. 83, it was said:

"As a mere abstract, scientific, or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax, a court would not be justified for the purpose of invalidating the tax in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is in fact brought to to every man's door; and for the purpose of deciding upon its validity, a tax should be regarded in its actual, practical results rather than with reference to those theoretical or abstract ideas, whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy."

In the case last mentioned, it was held that the case of *Pollock vs. Farmers Loan and Trust Co.*, 157 U. S. 429, 158 U. S. 601, has decided these two things:

"1st. That no sound distinction existed between a tax levied on a person solely because of his general ownership of real property and the same tax imposed solely because of his general ownership of personal property. Secondly. That the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned."

In *Railroad Co. v. Collector*, 100 U. S. 595, Mr. Justice Miller,

considering the Federal income tax law as amended by the Act of 1866, imposing a tax of five per cent on interest on bonds, dividends, or profits of certain corporations, said:

58 "The tax in our opinion is essentially an excise on the business of the class of corporations mentioned in the statute. The section is a part of the system of taxing incomes, earnings, and profits, adopted during the late war and abandoned as soon after that war ended as it could be done safely. The corporations mentioned in this section are those engaged in furnishing roadways and waterways for the transportation of persons and property, and the manifest purpose of the law was to levy the tax on the net earnings of such companies."

But such, we have seen, is not the conception of the more recent income tax legislation, pursuant to state constitutional provisions. Keeping in mind that the taxing power of the state is limited to the three subjects—persons, property, and business, and that, as said by Justice Field in the case involving tax on foreign held bonds, *supra*, whatever form taxation may assume, it must relate to one of these subjects; and keeping in mind, also, the inability of the state to subject to tax the person of a non-citizen as well as any property lying without the State, or any business transacted without the State, the tax under consideration must have relation to the person, property or business of the defendant. We have seen that as to citizens and residents of the state it clearly has relation to the person of the taxable as the recipient of the income, to the exclusion of any consideration of the source of such income, based upon the theory of the protection which the state affords him in his person as one of its citizens; but this theory fails when we come to consider non-citizens, for the state affords them no protection in their persons, and, being outside its territorial limits, it has no power or jurisdiction to impose upon them a tax purely personal in its nature. Nor does the fact that such non-citizen owns property or does business within the state empower the state to impose upon him a purely personal tax. It may tax such property, or business, but it cannot by calling such

59 tax an income tax change the nature of the tax. It would still be a property tax or an excise tax, according as it related to property or business. It is clear that the legislature realizing its inability to subject non-citizens to a tax purely personal in its nature, but desiring to bring them within the operation of its income tax law to the extent that their incomes are derived from property owned or business transacted within the state, has attempted to impose upon them what it styles an income tax but which is essentially a property or excise tax, measured by the net income derived from specific property or business within the state. But the property and business of non-citizens, while properly subject to any existing tax legislation operating alike upon citizens and non-citizens, may not be singled out and subjected to a tax which is not also imposed upon the property and business of citizens, merely because being that of non-citizens. The United States Constitution, Article 2, Section 4, provides that:

"The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states,"

and among such privileges and immunities of non-citizens of a state is the right to protection from discrimination against them in favor of citizens of the state in matters of taxation. In *Ward vs. Maryland*, 12th Wall. 418, the court said:

"Attempt will not be made to define the words, 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen
60 of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade or business, without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens. *Cooley, Const. Lim. 16; Brown v. Maryland, 12 Wheat. 449.*"

The tax under consideration is as to citizens of Oklahoma properly termed an income tax, because it is imposed upon them as a purely personal tax, measured by their incomes, in consideration for the protection which the state affords them in their persons, irrespective of the source of such income, or whether it be within or without the state; and the power of the state to levy such a tax upon its citizens is not questioned. But such a tax cannot reach citizens and residents of other states. In their persons they are only subject to the taxing power of the state of their domicile. If they acquire property or business in this state, they may be taxed as to such property or business to the extent, and only to the extent, that citizens of this state are taxed on similar property or business. Provisions for such taxes are found in laws other than the income tax law now being considered, and they apply to citizens and non-citizens alike. To the taxes provided by these laws, so far as they exist, the property and business of the plaintiff within this state are subjected equally with the property and business within the state of all other persons, resident and non-resident. This being true, to subject the plaintiff to this so-called income tax, which, as we have seen, as applied to a non-resident is essentially a tax upon his property and business within the state, to which the property and business of citizens and residents of the state are not subjected, is to deny to him the privileges and immunities of citizens of the state; for while by the same law a tax is imposed upon citizens of the
61 state, it is, as we have seen, a purely personal tax, not in any true sense a tax upon their property or business, and a tax in which the state cannot subject the plaintiff, because, being a citizen and resident of another sovereign state, this state has no jurisdiction to tax him on his person. Whether he shall be subjected to such personal income tax is a matter solely within the power of the state of his domicile to determine.

While styled an income tax, the subject of this tax is the recipient of the income. The income merely affords the measure of tax. This is the dominant conception in all modern so-called income tax legislation by the several states, so far as relates to residents and citizens of the state. The situs of the source of the income is ignored. The power to tax rests in the jurisdiction exercised by the state over the person receiving the income, and that its jurisdiction may not extend to the property or business producing the income is considered immaterial. The attempt to combine with legislation providing for such a tax a provision for a so-called income tax subjecting the net incomes of non-residents upon property or business within the state, founded not upon jurisdiction of the person but upon the fact that the situs of the property or business is within the state, can not in my judgment be sustained. They are essentially separate and distinct provisions, relating to separate and distinct subjects of taxation; and the latter provisions as to non-residents is in no wise strengthened because it is found coupled with the former. It is essentially a tax upon the property or business involved. In fact it must be that, for it will not be contended that the state has the power to subject non-citizens to a purely personal tax. For the purpose of determining its validity, it must be considered as standing alone;

and of course it will be conceded that an act imposing a tax upon the property or business owned or conducted within the state by non-residents, without imposing a like tax upon the property or business of residents, cannot be sustained.

It is suggested that because non-residents can come into Oklahoma and make fabulous profits from the exploitation of its great natural resources, it is desirable that the state furnishing such opportunities should as a consideration therefor be permitted to exact a return in taxation commensurate with the opportunities afforded; and it is further suggested that if these non-citizens cannot be taxed on their incomes as is sought to be done here, many operators who are now citizens and residents of the state will expatriate themselves, so as to avoid the income tax. But these are considerations which in no sense affect the legal questions involved. The Constitution of the United States has decreed that the natural resources of Oklahoma, however great, as well as those of every other state, are subject to development by all citizens of the United States alike, regardless of state lines, and citizens of other states may acquire property and do business here without subjecting themselves to liability for any purely personal taxes such as may be assessed against citizens and residents, and shall be subject to only such taxes on their property and business within the state as shall be levied upon similar property and business of citizens and residents of the state.

I am not unmindful of the fact that several other states have enacted laws similar to the one under consideration, and that the Federal income tax law provides for the collection of a tax from aliens and non-residents of the United States upon incomes accruing to them from property or business within the United States. No case directly deciding the question here involved has been found, and it is suggested in Section 15 of Black on Income

Taxes published in 1913, that this and kindred questions relating to the state income tax laws have not as yet been authoratatively settled by the courts. But for the foregoing reasons, I am forced to the conclusion that as to the plaintiff, who is not a citizen or resident of the state, the law is invalid as without the taxing power of the state, insofar as it may be said to attempt to impose a tax solely upon the person, because the plaintiff is not a citizen or resident of the state. If as to non-residents it be treated as a tax upon property or business, then it violates the privileges and immunities features of the Federal Constitution.

64 Endorsed: Filed Feb. 4, 1918, R. P. Harrison, Clerk United States District Court, Eastern District of Oklahoma.

And, to-wit, on the 7th day of February, A. D. 1918, the following proceedings were had in this cause. The Honorable Kimbrough Stone, Circuit Judge, Honorable John H. Cotteral, Judge of the District Court for the Western District of Oklahoma and Honorable Ralph E. Campbell, Judge of the District Court for the Eastern District of Oklahoma presiding:

Order.

In the matter of the application by plaintiff for a preliminary order of injunction, after full advice and due consideration, the order is refused and the application hereby denied. To which counsel for the plaintiff at the time, except.

KIMBROUGH STONE,
United States Circuit Court.
JOHN H. COTTERAL,
United States District Judge.
RALPH E. CAMPBELL,
United States District Judge.

Endorsed: Filed Feb. 7, 1918, R. P. Harrison, Clerk United States District Court, Eastern District of Oklahoma.

65 And, to-wit, on the 7th day of February, A. D. 1918, the Plaintiff in open court prayed an appeal to the Supreme Court of the United States and filed his Assignment of Errors, which Appeal was allowed by the Court. Said Assignment of Errors and Order Allowing Appeal are in words and figures as follows:

Assignment of Errors.

Now on this 7th day of February, A. D. 1918, comes Charles B. Shaffer, plaintiff in the above entitled action, and says that the decree entered in the above entitled action on the 7th day of February, A. D. 1918, denying his application for a preliminary injunction, is erroneous and unjust to him, the said plaintiff, for the following

reasons, which he assigns as error in said action and in said decree, to-wit:

1st. Because the Court erred in denying the preliminary injunction prayed for in the Amended Bill of Complaint.

2nd. Because the Court erred in holding that the State of Oklahoma protects the plaintiff in the production, creation, receipt and enjoyment of his income from property within the State;

3rd. Because the Court erred in holding that the tax in controversy in this action is not directed at either the plaintiff or at his property, but that it is directed at the privilege of making, producing, creating, receiving and enjoying the income itself;

4th. Because the Court erred in holding that the State of Oklahoma could levy a tax upon the plaintiff for the privilege of making, producing, creating, receiving and enjoying an income when a like tax is not levied upon residents of the State of Oklahoma;

5th. Because the Court erred in holding that there is no difference in the right of the United States Government to tax incomes of non-resident aliens from business and property within the United States, and the right of the State of Oklahoma to tax the income of non-residents of the State, citizens of the United States, from business and property within the State of Oklahoma;

6th. Because the Court erred in holding and deciding that the provision of Section 11, of Chapter 164 of the Session Laws of Oklahoma of 1915, creating a lien upon all of his property in Oklahoma for the collection of the income tax sought to be enjoined in this action, was valid and constitutional;

7th. Because the Court erred in holding and deciding that the provisions of Chapter 39 of the Session Laws of Oklahoma of 1916, with reference to a gross production tax from petroleum or other crude oil, or mineral oil, or natural gas, and especially the following provision to said Chapter, to-wit:

"The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the State, counties, cities, towns, townships, school districts, or other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil, or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt, or ores bearing minerals hereinabove mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described; * * *

and the payment of the tax provided for in said Chapter by this plaintiff, did not relieve him from the payment of the income tax as attempted to be levied by Section 164;

8th. Because the Court erred in holding that the tax in controversy in this action is a privilege tax and not a personal tax against the plaintiff;

9th. Because the Court erred in holding and deciding that the tax attempted to be levied does not deprive the plaintiff of his property without due process of law;

10th. Because the Court erred in holding and deciding that the tax attempted to be levied does not deprive plaintiff of the equal protection of the law;

11th. Because the Court erred in not holding that the tax in question in this action is unconstitutional, illegal and void in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States, for the reason that it attempts to abridge the privileges and immunities of a citizen of the United States;

12th. Because the Court erred in not holding and deciding that the tax in question in this action is unconstitutional, illegal and void and in violation of the Constitution of the United States, because it attempts to lay a burden upon interstate commerce;

13th. Because the Court erred in refusing to hold and in not holding and deciding that the tax in question in this case is in violation of the provision of Section 2 of Article 4 of the Constitution of the United States, which provides that:

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;"

14th. Because the Court erred in refusing to hold and in not holding that the tax in question in this action is unconstitutional, illegal and void, and an attempt to take plaintiff's property without due process of law, for the reason that plaintiff's net income is largely produced from exercise of his business skill, energy and judgment, all of which exists outside of the state of Oklahoma and not within the jurisdiction of said State;

15th. Because the Court erred in refusing to hold and in not holding and deciding that the situs of his income, is at his place of residence in the State of Illinois, and not in the State of Oklahoma, and that the same is not subject to the taxing power of the state of Oklahoma; and

16th. Because the Court erred in refusing to hold and in not holding and deciding that the provisions of Chapter 164 of the Session Laws of 1915 of the State of Oklahoma, with reference to income taxes, so far as the same attempts to levy an income tax upon the net income from all property owned, and of every business, trade or profession carried on in Oklahoma by persons residing elsewhere, are unconstitutional, illegal and void because such a tax takes the property of non-residents of Oklahoma and of this plaintiff without due process of law, in violation of the 14th Amendment to the Constitution of the United States, and because the provisions of said Chapter abridge the privileges and

immunities of citizens of the United States and of this plaintiff, in violation of the 14th Amendment of the Constitution of the United States, and because the provisions of said Chapter deprive this plaintiff of the equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States, and because the provisions of said Chapter violates the provision of Section 2 of Article 4 of the Constitution of the United States, which provides that, "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several states.

Wherefore, plaintiff prays that the decree of this Court denying and refusing a preliminary injunction in this action be reversed, and that this Court be instructed and directed to grant a preliminary injunction during the further pendency of this action; for costs of appeal and all proper relief.

GEO. S. RAMSEY,
EDGAR A. DE MEULES,
MALCOLM E. ROSSER,
VILLARD MARTIN,
J. BERRY KING,
Attorneys for Plaintiff.

Endorsed: Filed Feb. 7, 1918. R. P. Harrison, Clerk United States District Court, Eastern District of Oklahoma.

70 *Order Allowing Appeal.*

Now on this 7th day of February, A. D. 1918, after decree made, signed and filed, denying the preliminary injunction in the above entitled action, comes the plaintiff in open court and files his assignments of error and prays an appeal to the Supreme Court of the United States from the order and judgment of this Court denying the preliminary injunction prayed for in this action, which appeal is by the Court allowed, and the plaintiff, in open court, gives notice of his appeal to the Supreme Court of the United States.

Thereupon, the plaintiff in open court moves the Court to fix the amount of appeal bond herein, and thereupon the Court fixed the amount of the said appeal bond at Five Hundred Dollars, with sureties to be approved by the Court, and thereupon the plaintiff in open court filed his motion for an order restoring and continuing the temporary restraining order in force during the pendency of the appeal herein; and it appearing that unless the temporary restraining order heretofore made and entered in this action is restored and put in force during the pendency of the appeal taken herein, that the defendants will levy the tax warrant sought to be enjoined in this action, upon the property of the plaintiff and sell same for the payment of the taxes referred to in said warrant, and that plaintiff's said appeal will be ineffective for the protection of his rights;

The Court finds that said temporary restraining order should be

restored and continued in force during the pendency of the appeal; upon condition, however, that the said plaintiff shall within ten (10) days, give a bond with solvent sureties to be approved by the Judge of this Court, in the sum of One Hundred Thousand Dollars, conditioned to pay all the taxes for which the tax warrant sought to be enjoined in this action was issued, together with all interest and penalties accruing thereon during the pendency of said appeal, and upon the further condition that the said plaintiff shall file in the Supreme Court of the United States, within thirty (30) days from the date hereof, a motion to advance the case so appealed, for an early hearing in said Supreme Court.

It is, therefore, considered and ordered that said temporary restraining order be, and the same is, hereby restored and continued in force during the pendency of this appeal; and it is further considered, ordered and adjudged that the defendants, E. B. Howard, State Auditor, and John S. Woofter, Sheriff of Creek County, Oklahoma, be, and they are, hereby enjoined and restrained from proceeding further to levy said tax warrant and from further attempting to collect the sum of money ordered to be collected by said tax warrant during the pendency of the appeal in this action; and

It is further ordered that, if the plaintiff fails or refuses within ten (10) days from the date hereof, to execute a bond as herein required, or if he fails within thirty (30) days to file in the Supreme Court of the United States, a motion to advance this case, then the order herein made, restoring said restraining order and continuing same in force during the pendency of said appeal, shall be dissolved and set aside.

RALPH E. CAMPBELL, *Judge*.

Endorsed: Filed Feb. 7, 1918, R. P. Harrison, Clerk United States District Court, Eastern District of Oklahoma.

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Bond.

Know all men by these presents:

That we, Charles B. Shaffer, as Principal, and The United States Fidelity and Guaranty Company, a corporation, as Surety, are held and firmly bound unto E. B. Howard, State Auditor, and John S. Woofter, Sheriff of Creek County, Oklahoma, in the sum of Five Hundred (\$500.00) Dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Witness our hands and seals this 7th day of February, A. D. 1918.

The condition of the foregoing obligation is such that, whereas, on the 7th day of February, A. D. 1918, in a suit pending in said Court wherein the above named Charles B. Shaffer was plaintiff, and E. B. Howard, State Auditor, and John S. Woofter, Sheriff of Creek County, Oklahoma, were defendants, a decree was rendered

74 by the Honorable Kimbrough Stone, United States Circuit Judge; Honorable John H. Cotteral, United States District Judge, and Honorable Ralph E. Campbell, United States District Judge, denying the application of the plaintiff for a preliminary injunction during the pendency of said action; and

Whereas, the said Charles B. Shaffer has obtained an appeal to the Supreme Court of the United States to reverse said decree denying said preliminary injunction and has given notice of said appeal in open court;

Now, therefore, the condition of the foregoing obligation is such that if said plaintiff shall prosecute his appeal to effect and answer all costs if he fails to make his plea good, then the above obligation shall be void; otherwise, to remain in full force and effect.

CHARLES B. SHAFFER,

By MALCOLM E. ROSSER,

His Attorney.

UNITED STATES FIDELITY & GUARANTY
COMPANY,

By WALLACE B. BUTZ,

Attorney in Fact.

[CORPORATE SEAL.]

Approved this 7th day of February, 1918.

RALPH E. CAMPBELL, *Judge.*

Endorsed: Filed Feb. 7th, 1918. R. P. Harrison, Clerk United States District Court, Eastern District of Okla.

75 *Bond.*

Know all men by these presents:

That we, Charles B. Shaffer, as Principal, and The United States Fidelity and Guaranty Company, a corporation, as Surety, are held and firmly bound unto E. B. Howard, State Auditor, and John S. Woofter, Sheriff of Creek County, Oklahoma, in the sum of One Hundred Thousand (\$100,000.00) Dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Witness our hands and seals this 7th day of February, A. D. 1918.

The condition of the foregoing obligation is such that, whereas, on the 7th day of February, A. D. 1918, in a suit pending — the said Court wherein the above named Charles B. Shaffer was plaintiff, and E. B. Howard, State Auditor, and John S. Woofter, Sheriff of

76 Creek County, Oklahoma, were defendants, a decree was rendered by the Honorable Kimbrough Stone, United States Circuit Judge; Honorable John H. Cotteral, United States District Judge, and Honorable Ralph E. Campbell, United States District Judge, denying the application of the plaintiff for a preliminary injunction during the pendency of said action; and

Whereas, the said Charles B. Shaffer has obtained an appeal to the Supreme Court of the United States to reverse said decree denying said preliminary injunction and has given notice of said appeal in open court; and

Whereas, the Court has made an order restoring and continuing the temporary restraining order heretofore granted in this action, in force during the pendency of the appeal herein, upon the condition that the plaintiff shall give a bond in the sum of One Hundred Thousand (\$100,000.00) Dollars:

Now, therefore, if the said plaintiff shall pay all taxes, for which the tax warrant sought to be enjoined in this action was issued, together with all interest and penalties accruing thereon in the event the said decree denying the preliminary injunction should be affirmed by the Supreme Court of the United States, then the foregoing obligation shall be void; otherwise, to remain in full force and effect.

CHARLES B. SHAFFER,
By MALCOLM E. ROSSER,

His Attorney.

[CORPORATE SEAL.] UNITED STATES FIDELITY &
GUARANTY COMPANY,

By WALLACE B. BUTZ,
Attorney in Fact.

The within bond approved this February 7th, 1918.
RALPH E. CAMPBELL, *Judge.*

Endorsed: Filed Feb. 7, 1918, R. P. Harrison, Clerk United States
— Court, Eastern District of Oklahoma.

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Stipulation as to Contents of Record.

It is hereby agreed and stipulated by and between Geo. S. Ramsey, Edgar A. de Meules, Malcolm E. Rosser and Villard Martin, attorneys for the plaintiff Charles B. Shaffer, and S. P. Freeling, Attorney General of the State of Oklahoma, attorney for the defendants, E. B. Howard and John S. Woofter, that the transcript of the record in the above entitled case, on appeal to the Supreme Court of the United States, shall consist of the portions of the record, to-wit:

- 1st. Amended Bill of Complaint;
- 2nd. Temporary Restraining Order;
- 3rd. Defendants' Plea to Jurisdiction;
- 4th. Defendants' Answer;
- 5th. Plaintiff's Affidavit;
- 6th. Order Submitting Cause;
- 7th. Opinions of the Several Judges;
- 8th. Order denying application for Preliminary Injunction;
- 9th. Order allowing appeal;

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- 10th. Assignments of Error;
- 11th. Bond for costs of appeal;
- 12th. Bond to restore temporary restraining order during pendency of appeal;
- 13th. This stipulation as to contents of the transcript of the record; and
- 14th. Certificate of Clerk.

And it is agreed and stipulated that same shall constitute the record on appeal in this case; and it is further agreed and stipulated that all the formal parts of the record hereinabove referred to shall be omitted.

GEO. S. RAMSEY,
EDGAR A. DE MEULES,
MALCOLM E. ROSSER,
VILLARD MARTIN,

Attorneys for Plaintiff.

S. P. FREELING,

Attorney General;

C. W. KING,

Assistant Attorney General,

Attorneys for Defendants.

Endorsed: Filed Feb. 12, 1918, R. P. Harrison, Clerk United States District Court, Eastern District of Oklahoma.

79 UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

I, R. P. Harrison, Clerk United States District Court Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct transcript of so much of the record in the case of Charles B. Shaffer vs. E. B. Howard, State Auditor, et al., No. 2444 Equity, as was ordered by præcipe of counsel herein to be prepared and authenticated as the same appears from the records in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court at my office, in the City of Muskogee, this 19th day of February, A. D. 1918.

[Seal of the United States District Court, Eastern District of Oklahoma.]

R. P. HARRISON, *Clerk,*
By H. E. BOUDINOT, *Deputy.*

Endorsed on cover: File No. 26359. E. Oklahoma D. C. U. S. Term No. 892. Charles B. Shaffer, appellant, vs. E. B. Howard, State Auditor of the State of Oklahoma, and John S. Woofter, Sheriff of Creek County, State of Oklahoma. Filed February 27th, 1918. File No. 26359.

In the
SUPREME COURT OF THE UNITED STATES.
October Term, 1917.

No. 892.

CHARLES B. SHAFFER, - - - - - Appellant,

vs.

**E. B. HOWARD, State Auditor, and JOHN S.
WOOFER, Sheriff, - - - - - Appellees.**

MOTION to ADVANCE.

To the Honorable, the Supreme Court of the United States:

Comes now the appellant, Charles B. Shaffer, and states that this is an appeal taken by him from an order made in the United States District Court for the Eastern District of Oklahoma, by the Honorable KIMBROUGH STONE, United States Circuit Judge of the Eighth Judicial Circuit of the United States, the Honorable RALPH E. CAMPBELL, United

States District Judge for the Eastern District of Oklahoma and the Honorable JOHN H. COTTERAL, United States District Judge for the Western District of Oklahoma, sitting together in said District, pursuant to the provisions of Section 266 of the Judicial Code, denying his application for an interlocutory injunction to enjoin and restrain the appellees, E. B. Howard, State Auditor of the State of Oklahoma, and John S. Woofter, Sheriff of Creek County, Oklahoma, from levying a tax warrant issued by said Howard as State Auditor for the collection of an income tax assessed or attempted to be assessed against him by the State of Oklahoma, and from further attempting to collect the sum of money attempted to be assessed against him by the State of Oklahoma as taxes upon income derived by him from property owned by him in the State of Oklahoma, and business carried on, as he claims, partly within and partly without said State.

He states that the grounds upon which he seeks said interlocutory injunction in substance are that he is a resident of the State of Illinois and a non-resident of the State of Oklahoma; that the income sought to be taxed is derived by him from oil and gas produced in the State of Oklahoma, but sold outside of the State, and that he manages the business of producing said oil and gas from his residence outside of said State; that the State of Oklahoma has no juris-

diction to tax his income, and that the tax attempted to be assessed and collected would take his property without due process of law; that the tax attempted to be assessed and collected was and is discriminatory and deprives him of the equal protection of the law and deprives him of privileges and immunities enjoyed by citizens of the State of Oklahoma; that the tax attempted to be collected is illegal because it is a burden upon interstate commerce; that the tax is illegal because his entire income from property and business in the State of Oklahoma is derived from oil and gas; that he has paid a gross production tax to the State of Oklahoma as required by Chapter 39 of the Session Laws of Oklahoma of 1916, and that said chapter provides that the payment of said gross production tax shall be in lieu of all taxes by the State, counties, cities, towns, townships, school districts or other municipalities upon any property rights attached to or inherent in the right to said minerals, and that by the payment of said gross production tax, he is relieved from the payment of all other taxes upon the oil and gas produced and the proceeds thereof; that the provisions of Section 11 of said Chapter 164 of the Session Laws of Oklahoma makes the tax attempted to be collected a lien upon all his property in the State of Oklahoma, and that the State is without jurisdiction to create a lien for taxes upon any of his property other than for the

taxes assessed against the property on which the lien is claimed, and that the provisions of Section 11 of said Chapter 164 attempting to create a lien upon his property for the taxes attempted to be assessed upon his income, deprives him of his property without due process of law, and deprives him of the equal protection of the laws.

He states that the questions involved are of great importance; that a large number of persons residing outside of the State of Oklahoma, but deriving income from property or business within the State of Oklahoma are interested in the questions involved, and are withholding the payment of such taxes until the questions herein involved are decided by this Court; that at least one other action is pending in the State of Oklahoma, involving the validity of the same kind of tax, and that the question of the validity of such a tax has never been decided by any court except the three judges before whom said application was tried, and that one of said judges dissented from the conclusion that the interlocutory injunction should be refused.

He states that the terms of office of the appellee, E. B. Howard, as State Auditor of the State of Oklahoma, and of the appellee, John S. Woofter, as Sheriff of Creek County, Oklahoma, expire on the second Monday in January, A. D. 1919, and that unless this appeal is heard and decided prior to that

date this suit will abate as held by this Court in *Pullman Co. v. Knott*, 243 U. S. 447, and appellant will have to bring another suit in order to obtain the decision of this Court on the questions involved.

Wherefore, appellant moves this Court to advance this cause and to set it for oral argument on the first day of the October, 1918, term of this Court.

Respectfully,

GEO. S. RAMSEY,
EDGAR A. DE MEULES,
MALCOLM E. ROSSER,
VILLARD MARTIN,
Counsel for Appellant.

The State of Oklahoma hereby joins in this motion to advance the above cause, and requests the Court to set the same for oral argument on the first day of the October, 1918, Term.

S. P. FREELING,
Attorney-General.

FILED

FEB 7 1919

JAMES D. MAHER,
CLERK.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 375.

CHARLES B. SHAFFER, APPELLANT,

vs.

E. B. HOWARD, AUDITOR OF THE STATE OF OKLAHOMA,
AND JOHN S. WOOFER, SHERIFF OF CREEK COUNTY,
STATE OF OKLAHOMA, APPELLEES.

**STATEMENT AND STIPULATION OF COUNSEL IN
RESPONSE TO ORDER OF COURT OF JANUARY 20,
1919.**

Comes now Malcolm E. Rosser, counsel for appellant in the above entitled and numbered action, and S. P. Freeling, Attorney General of the State of Oklahoma, counsel for the appellees in the above entitled and numbered action, and in response to the request of the court, made on the 20th day of January, 1919, for information on the subject of the expiration of the official term of the said officers, who were defendants below and appellees here, stated to the court:

That the term of the said E. B. Howard expired on the 13th day of January, 1919, and that he was succeeded by

Frank C. Carter, who is the present State auditor of the State of Oklahoma, for a term of four years from the said 13th day of January, 1919, and that the term of the said John S. Woofter, sheriff of Creek County, Oklahoma, expired on the 7th day of January, 1919, and that he was succeeded by Abner Bruce, who is now the sheriff of Creek County, Oklahoma, and whose term continues for two years from the 7th day of January, 1919.

Respectfully submitted,

MALCOLM E. ROSSER,
Counsel for Appellant.
 S. P. FREELING,
Counsel for Appellees.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 375.

CHARLES B. SHAFFER, *Appellant,*

vs.

E. B. HOWARD, *Auditor of the State of Oklahoma, and JOHN S. WOOFTER, Sheriff of Creek County, State of Oklahoma, Appellees.*

Stipulation.

Comes now S. P. Freeling, Attorney General of the State of Oklahoma, counsel for the appellees in the above entitled and numbered action, and states to the court:

That Frank C. Carter, the present State auditor of the State of Oklahoma, who succeeded E. B. Howard, one of the appellees in the above-entitled action, and Abner Bruce, the present sheriff of Creek County, Oklahoma, who succeeded John S. Woofter, one of the appellees in the above-entitled action, believe that the tax, the collection of which is sought

to be enjoined in the above-entitled action, is a legal and valid tax and collectible by the State of Oklahoma, and that they will proceed immediately to collect said tax, and that the said Frank C. Carter, State auditor, will issue a tax warrant, and the said Abner Bruce, sheriff of Creek County, Oklahoma, will proceed to levy the same and sell the appellant's property, unless enjoined and restrained; and

Comes now Malcolm E. Rosser, counsel for appellant in the above-entitled action, and also S. P. Freeling, Attorney General of the State of Oklahoma, and state to the court:

That a decision in the above-entitled action is of great importance and interest to the people of the State of Oklahoma, and also to a great many non-residents of the State of Oklahoma, who have income from property and business within the State of Oklahoma, and they respectfully request this honorable court to decide the case now pending upon the record, briefs, and arguments heretofore presented.

Dated this 3d day of February, A. D. 1919.

MALCOLM E. ROSSER,

Counsel for Appellant.

S. P. FREELING,

Attorney General of the State of Oklahoma,

Counsel for Appellees.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 375.

CHARLES B. SHAFFER, *Appellant*,*vs.*E. B. HOWARD, *Auditor of the State of Oklahoma*, and JOHN S. WOOFER, *Sheriff of Creek County, State of Oklahoma*,
*Appellees.***Stipulation.***To the Honorable the Supreme Court of the United States:*

Comes now Frank C. Carter, State auditor of the State of Oklahoma, and represents to the court that he is the successor in office of E. B. Howard, one of the appellees in the above-entitled action, and that his term of office began on the 13th day of January, 1919; that he believes the tax sought to be collected in the above entitled and numbered action is lawful and valid, and that if the above-entitled action is dismissed by this honorable court, without a decision, he will immediately issue a tax warrant against the appellant, Charles B. Shaffer, for the collection of said taxes and will place the same in the hands of Abner Bruce, the present sheriff of Creek County, Oklahoma, who succeeded in office John S. Wofter, one of the appellees in the above entitled and numbered action, and he respectfully requests this court to substitute him, the present State auditor of the State of Oklahoma, as appellee in the above-entitled action, and to proceed to the decision of said cause.

Dated this 3d day of February, A. D. 1919.

FRANK CARTER,

Auditor of the State of Oklahoma.

[Endorsed:] File No. 26,359. Supreme Court U. S. October Term, 1918. Term No. 375. Charles B. Shaffer, Appellant, *vs.* E. B. Howard, State Auditor, etc. Statement and stipulation of counsel in response to order of court of January 20, 1919. Filed February 7, 1919.